

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE LANDS COUNCIL, a
Washington nonprofit
corporation, HELLS CANYON
PRESERVATION COUNCIL, an
Oregon nonprofit corporation,
OREGON NATURAL RESOURCES
COUNCIL, an Oregon nonprofit
corporation, and SIERRA CLUB,
a California nonprofit
corporation,

Plaintiffs,

v.

KEVIN MARTIN, Forest
Supervisor of the Umatilla
National Forest, and the
UNITED STATES FOREST SERVICE,
an agency of the United
States Department of
Agriculture,

Defendants,

and

AMERICAN FOREST RESOURCE
COUNCIL, an Oregon
corporation; BOISE BUILDING
SOLUTIONS MANUFACTURING, LLC,
a Washington limited
liability company; and Dodge
Logging, Inc., an Oregon
corporation,

Defendant-Intervenors.

NO. CV-06-0229-LRS

ORDER DENYING PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

1 **I. Introduction**

2 Having exhausted their administrative remedies, Plaintiffs filed
3 this suit in the district court on August 15, 2006. On August 30,
4 2006, the Court heard oral argument on the Motion for Temporary
5 Restraining Order and Preliminary Injunction (Ct. Rec. 2), filed on
6 August 16, 2006 by Plaintiffs Lands Council, Hells Canyon Preservation
7 Council, Oregon Natural Resources Council, and the Sierra Club.

8 Other motions also pending include Motions to Expedite (Ct. Recs.
9 21, 31) and Motion to Intervene (Ct. Rec. 22) filed by American Forest
10 Resource Council, Boise Building Solutions Manufacturing, LLC, and
11 Dodge Logging, Inc.; American Forest Resource Council, Boise Building
12 Solutions Manufacturing, LLC, and Dodge Logging, Inc.; Motion to
13 Appear Pro Hac Vice re Attorney Scott Horngren (Ct. Rec. 19); and
14 Plaintiffs' Motion to Strike Second Declaration of Dean Millett, or in
15 the Alternative, Permission to Submit Third Declaration of Dr. Edwin
16 B. Royce and Additional Briefing (Ct. Rec. 58).

17 Ms. Karen S. Lindholdt and Mr. Ralph Bloemers appeared on behalf
18 of Plaintiffs Lands Council, Hells Canyon Preservation Council, Oregon
19 Natural Resources Council, and Sierra Club("Plaintiffs"). Ms. Beverly
20 Li represented Defendant United States Forest Service ("USFS") and Mr.
21 Scott Horngren represented Defendant-Intervenors American Forest
22 Resource Council, Boise Building Solutions Manufacturing, LLC, and
23 Dodge Logging, Inc. ("Intervenors").

24 After reviewing the submitted material, taking oral argument,
25 and considering relevant authority, the Court is fully informed and
26

1 hereby denies Plaintiffs' Temporary Restraining Order and Preliminary
2 Injunction, Ct. Rec. 2.

3 **II. Factual Background**

4 In August 2005, the School Fire burned approximately 51,000
5 acres, about 28,000 acres of which were on the Umatilla National
6 Forest ("UNF"). Li Decl., Exh. B at 1-2. The School Fire was
7 characterized as a mosaic burn pattern, leaving areas untouched
8 adjacent to the burned areas according to the Plaintiffs. Plaintiffs
9 argue that many trees showed little, if any, sign of scorch or burn.
10 Defendants assert that about 15,380 acres of the total burned National
11 Forest lands may have experienced direct or immediate consequences of
12 fire-caused injury severe enough to kill 75% or more of the trees.
13 EIS at 1-3.

14 The entire School Recovery Project ("Project") - instituted in
15 response to the School Fire - area consists of an estimated 9,432
16 acres of burned woodland located in the Umatilla National Forest and
17 involves the salvage harvest of dead and dying trees and any trees
18 that present a danger to public safety. EIS at 1-6.

19 Development of the Project began in the fall of 2005. Ct. Rec.
20 34, at 2. On October 26, 2005, USFS published a Notice of Intent to
21 prepare an Environmental Impact Statement ("EIS"), 70 Fed. Reg. 61783
22 (Oct. 26, 2005). USFS also provided informational packets to 230
23 individuals and organizations, soliciting comments from the public on
24 the proposal. EIS at 2-2. USFS received and reviewed 24 scoping
25 comments. EIS at 2-4. On April 20, 2006, USFS released a draft EIS
26 on the Project, including all of the Plaintiffs. EIS at 2-3. USFS

1 received and responded to 22 of the comments on the Draft EIS for the
2 Project. EIS at 2-4.

3 On July 10, 2006 the USFS completed and released a Final EIS
4 analyzing the potential environmental impacts of the proposed Project.
5 Ct. Rec. 34, at 3. On July 31, 2006, the Forest Service Chief signed
6 an Emergency Situation Determination ("ESD") under 36 C.F.R. §
7 215.10(b) for the Milly, Oli and Sun sales that lie, according to
8 Defendants, in 3,674 acres of the most severely burned areas of the
9 Project. This determination was based on substantial loss in economic
10 value of dead and dying timber if implementation of that portion of
11 the Project were delayed during the administrative appeals process
12 until November 2006. Li Decl., Exh. G. Such a delay, according to
13 Project Leader Dean Millett, would result in a potential loss in value
14 to the federal government of \$1,547,000. Millett Decl., §3. On
15 August 14, 2006, the Forest Supervisor for the UNF signed the Record
16 of Decision approving the Project. Exh. A to Li Decl. On August 22,
17 2006, USFS auctioned the Milly, Oli and Sun salvage sales. Musgrove
18 Decl., ¶2.

19 USFS provides (4) reasons as the "Purpose and Need" for this
20 Project:

- 21 1) recover "some economic value" for the community from the
burned timber;
- 22 2) provide for timber harvest to help meet demand for wood
products;
- 23 3) provide for a safe road trail system; and
- 24 4) provide for the production of wood products "consistent
with various resource objectives and environmental
constraints."
- 25
- 26

1 The Environmental Impact Statement ("EIS") for the Project
2 consisted of (3) alternatives:

- 3 1) Alternative A: No action
- 4 2) Alternative B: Log 9,432 acres
- 5 3) Alternative C: Log 4,188 acres.

6 The USFS selected Alternative B. The EIS indicated that
7 reforestation by hand planting would occur on the harvested acres that
8 are outside danger tree areas. Id.

9 Plaintiffs argue that the USFS failed to adequately analyze the
10 environmental impacts of the Project. More specifically, Plaintiffs
11 argue that two significant roadless areas will be impacted by the
12 Project. Ct. Rec. 3, at 5. The West Tucannon roadless area is located
13 to the West of the Willow Spring Inventoried Roadless Area ("Willow
14 Springs IRA"). West Tucannon is separated from Willow Springs by
15 forest road 47 and is close to 5,000 acres in size. The Upper Cummins
16 Creek roadless area is immediately adjacent to the Southeast corner of
17 Willow Springs, a roadless area of more than 10,000 acres. Id.

18 Plaintiffs allege that Defendants have failed to comply with the
19 National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370, the
20 National Forest Management Act ("NFMA"), 16 U.S.C. § 1600-1614, the
21 Administrative Procedures Act ("APA"), 5 U.S.C. § 501-706, and
22 applicable implementing regulations in issuing the Project. Plaintiffs
23 seek injunctive relief to prevent alleged irreparable injury to old
24 growth stands, roadless areas, soils, and habitat for salmon,
25 steelhead, Rocky Mountain Elk and a diverse range of protected
26 species. Ct. Rec. 3, at 3.

1 On August 18, 2006, the parties reached a stipulation regarding a
2 briefing schedule that allowed the matter to be heard by the Court
3 prior to ground disturbing activities. The USFS agreed to stay all
4 on-the-ground implementation of the Milly, Oli, and Sun Salvage Sales
5 until September 2, 2006. At the hearing on August 30, 2006, the
6 parties reached another stipulation to stay all on-the-ground
7 implementation of the Milly, Oli, and Sun Salvage Sales until
8 September 12, 2006, while the Court took the case under advisement.

9 **III. Motion to Intervene**

10 A. Timber Contractors-Applicants Dodge Logging and Boise
11 Building Solutions Manufacturing, LLC

12 Intervenor applicants seek to intervene as of right or
13 permissively pursuant to Federal Rule of Civil Procedure 24.

14 Timeliness is "the threshold requirement" for intervention as of
15 right. *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir.1990).
16 Here, the action was filed on August 15, 2006, and the motion to
17 intervene was filed on August 24, 2006. This motion was brought at
18 the outset of litigation, and on the same day as the filing of the
19 response by the named defendants and prior to the issuance of a
20 pretrial scheduling order or answer by the named defendants. See
21 *Sierra Club v. U.S. E.P.A.*, 995 F.2d 1478, 1481 (9th Cir.1993)
22 (upholding trial court's finding that application was timely where
23 filed before defendant had filed its answer). There is no evidence
24 that intervention by applicant will prejudice any existing party.
25 Accordingly, the court finds that applicant's motion to intervene was
26 timely filed.

1 In addition to filing a timely motion, applicants must show that
2 they have an interest in the subject matter of the litigation.
3 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir.1983).
4 The timber contractors Dodge Logging and Boise Building Solutions
5 Manufacturing, LLC assert that they have been awarded contracts
6 relating to the Project. Ct. Rec. 23 at 2. The Ninth Circuit has
7 explicitly held that ownership of projects that are involved in
8 various stages of planning and implementation are sufficient to
9 constitute legally protectable interests for the purpose of
10 intervention as of right. *Berg*, 268 F.3d at 820 ("Contract rights are
11 traditionally protectable interests."). Because the Project's
12 implementation is threatened by plaintiffs' claim for declaratory and
13 injunctive relief, there is a clear connection between timber
14 contractor applicants' protectable interest in the contracts and the
15 relief sought by plaintiffs in the action. See *id.* Thus, the timber
16 contractor applicants have asserted a protectable interest in their
17 respective contracts that could be affected by the relief sought by
18 plaintiffs.

19 Finally, the applicants for intervention must demonstrate that
20 the party on whose side it seeks to intervene is not capable or
21 willing to make the intervenor's arguments. See *Idaho Farm Bureau*
22 *Fed'n*, 58 F.3d at 1398. "The burden of making this showing is
23 minimal." *Pacific Gas & Elec. Co. v. Lynch*, 216 F.Supp.2d 1016, 1025
24 (N.D.Cal.2002) (citing *Sagebrush Rebellion*, 713 F.2d at 528).
25 Applicants may satisfy this burden by demonstrating that the
26 representation of their interests may be inadequate. *Trbovich v.*

1 *United Mine Workers*, 404 U.S. 528, 538 n. 10 (1971). The Ninth
2 Circuit considers three factors in determining the adequacy of
3 representation: (1) whether the interest of a present party is such
4 that it will undoubtedly make all of a proposed intervenor's
5 arguments; (2) whether the present party is capable and willing to
6 make such arguments; and (3) whether a proposed intervenor would offer
7 any necessary elements to the proceeding that other parties would
8 neglect. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.2003)
9 (*citing California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778
10 (9th Cir.1986)).

11 The named defendants in this action are government entities and
12 officials. These defendants do not have the same type of vested
13 economic interest in the litigation as the timber contractors.
14 Therefore, because the named defendants have different interests than
15 the timber contractors, if plaintiffs prevail, it is likely that
16 defendants will not advance the same arguments as the timber
17 contractors in regards to potential remedies. *See Berg*, 268 F.3d at
18 824. Therefore, there is sufficient doubt about the adequacy of
19 representation to warrant intervention in the remedial portion of the
20 litigation. *See id.* (citations and quotations omitted). The Court
21 grants Dodge Logging and Boise Building Solutions Manufacturing, LLC's
22 requests to intervene as a matter of right.

23 B. Applicant American Forest Resource Council

24 As to American Forest Resource Council ("AFRC"), it desires to
25 intervene because this lawsuit seeks to halt the Project. AFRC is a
26 not-for-profit organization representing wood products companies and

1 owners of timber land throughout the west. The Court finds that
2 AFRC's request falls more closely within the parameters of permissive
3 intervention pursuant to Rule 24(b). In order to intervene
4 permissively, AFRC must prove that it meets three threshold
5 requirements: (1) the court has an independent basis for jurisdiction;
6 (2) the motion is timely; and (3) applicant shares a common question
7 of law or fact with the main action. Fed.R.Civ.P. 24(b). AFRC has
8 minimally satisfied the threshold requirements for permissive
9 intervention. However, intervention pursuant to Rule 24(b) is within
10 the trial court's discretion and must take into account the prejudice
11 to the original parties, including the potential for undue delay.
12 Therefore, the Court grants AFRC's request to intervene under Rule
13 24(b) and its discretionary powers.

14 **IV. Preliminary Injunction Standard**

15 A preliminary injunction is an extraordinary remedy. *Weinberger*
16 *v. Romero-Barcelo*, 102 S. Ct. 1798, 1803 (1982); *Hawaii County Green*
17 *Party v. Clinton*, 980 F.Supp. 1160, 1167 (D. Hawaii 1997). In the
18 Ninth Circuit, a court may grant such a remedy if a plaintiff
19 "demonstrates either a combination of probable success on the merits
20 and the possibility of irreparable injury or that serious questions
21 are raised and the balance of hardships tips sharply in his favor."
22 *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005)
23 (quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430
24 (9th Cir.1995)). "These two formulations represent two points on a
25 sliding scale in which the required degree of irreparable harm
26 increases as the probability of success decreases." *Roe v. Anderson*,

1 134 F.3d 1400, 1402 (9th Cir. 1998) (*quoting United States v.*
2 *Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992)). Plaintiff, as
3 the party seeking injunctive relief, bears the burden of demonstrating
4 these factors justifying relief by clear and convincing evidence.
5 *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423,
6 441 (1974).

7 "Injunctive relief is an equitable remedy, requiring the court to
8 engage in the traditional balance of harms analysis, even in the
9 context of environmental litigation." *Forest Conservation Council v.*
10 *U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995). The Supreme
11 Court has held that insufficient evaluation of environmental impact
12 under NEPA does not create a presumption of irreparable injury. See
13 *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).
14 However, the Ninth Circuit observed "[e]nvironmental injury, by its
15 nature, can seldom be adequately remedied by money damages and is
16 often permanent or at least of long duration, i.e., irreparable."
17 *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir.
18 2000) (*citing Amoco*, 480 U.S. at 545). Therefore, "when the
19 environmental injury is 'sufficiently likely, the balance of harms
20 will usually favor the issuance of an injunction to protect the
21 environment.'" *Id.* Irreparable harm is defined as an actual or
22 concrete harm, or the imminent threat of an actual or concrete harm.
23 *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634
24 F.2d 1197, 1200 (9th Cir. 1980). A threat of harm will not be
25 considered "imminent," if it is based on merely remote possibilities
26

1 or speculation. *Carribean Marine Serv. Co. v. Baldrige*, 844 F.2d
2 668, 675 (9th Cir.1988).

3 In reviewing the USFS's compliance with NEPA and NFMA, the court
4 must determine whether the agency's actions were "arbitrary and
5 capricious, an abuse of discretion, or otherwise not in accordance
6 with the law." *Or. Nat. Resources Council v. Loew*, 109 F.3d 521, 526
7 (9th Cir. 1997). Review under such a standard is narrow and highly
8 deferential, only requiring the agency to "articulate a rational
9 connection between the facts found and the conclusions made." *Id.* The
10 Ninth Circuit requires that a challenge to a decision to not prepare
11 an initial EIS must be reviewed under the arbitrary and capricious
12 standard. *Greenpeace Action*, 14 F.3d at 1331. Given the narrowness of
13 the standard of review, the Court recognizes it may not substitute its
14 own judgment for that of the agency concerning the wisdom or prudence
15 of a proposed action. *W. Radio Services Co., Inc. v. Glickman*, 113
16 F.3d 966, 970 (9th Cir. 1997).

17 **V. Analysis**

18 From Plaintiffs' perspective the motion before the Court involves
19 restraining defendants from awarding any contracts for logging and
20 road building in the Milly, Oli and Sun Salvage sales and otherwise
21 implementing any portion of the School Fire Salvage Recovery Project
22 to prevent irreparable injury to: 1) old growth stands; 2) roadless
23 areas; 3) soils; and 4) habitat for endangered species of salmon,
24 steelhead, Rocky Mountain Elk, and a diverse range of protected
25 species. Plaintiffs believe through expert opinion that Dr. Royce's
26 survey and conclusion that "64% of trees designated for harvest had a

1 good probability for survival." First Royce Decl., ¶83. Dr. Royce
2 later states in his Second Declaration that it can be "inferred" that
3 over half of the trees in the Oli sale area have a high probability of
4 surviving if not harvested. Second Royce Decl., ¶13. For the Sun
5 sale, Dr. Royce later asserts that it can be inferred that over one
6 third of the trees in the sale area have a high probability of
7 surviving if not harvested. Id. ¶14. For the Milly sale area, Dr.
8 Royce later asserts that it can be inferred that over half of the
9 trees in the sale area have a high probability of surviving if not
10 harvested. Id. ¶15.

11 From the USFS's perspective this decision involves the harvest of
12 timber on approximately 3,657 acres in the Milly, Oli and Sun sale
13 areas. Defendants state that greater than 95% of the trees are dead
14 in the salvage cutting units in these three sales. Walker Decl., ¶8.¹

15
16 ¹Paragraph 8 of the Walker Declaration states, in pertinent part:

17 As described above, during project planning and in
18 preparation of the ESD, we targeted stands that had
19 90 percent or greater mortality (based on post-fire
20 field reconnaissance and infrared digital ortho
21 photographs). In a random sample of the units that
22 I inspected in the field, I found that greater than
23 95 percent of the trees in these stands were clearly
24 dead (Digital images and audio files related to
25 field review work are located in the FEIS Project
26 Record). As stated in the FEIS (Appendix B, page B-
1), dead trees were identified by (1) blackened
boles and the complete absence of needles, (2)
crowns having all brown needles, or (3) crowns
having "fading" or "dry-appearing" (off-color) green
needles throughout the crown. I observed that
within the approximate five percent of the trees
with green needles, approximately half were clearly
alive and were not designated for removal.

1 Only 2 to 3 percent of the trees in the Milly, Oli and Sun sale units
2 had green needles and were rated for survival using the Scott
3 Guidelines². Id., ¶8. Trees with a low likelihood of survival were
4 designated for harvest. Id. Those trees that were rated as highly
5 likely to survive were designated for retention. Id. The small
6 percentage that rated moderate and had two or more quadrants of live
7 cambium were designated for retention. Id. No other sales are at
8 issue in this motion for preliminary injunction. The remaining
9 salvage sales are not expected to be ready for harvest until 2007,
10 after any administrative appeal process has been completed. Martin
11 Decl., ¶3.

12 A. Evidence Considered

13 This Court considered, in this action, the following evidence:

- 14 1.1 Civil Action Complaint;
15 1.2 Memorandum in Support of Motion for Temporary
16 Restraining Order and Preliminary Injunction;
17 1.3 Declaration by Mike Petersen;
18 1.4 Declaration by Ralph Bloemers;
19 1.5 Declaration by Jon Rhodes;
20 1.6 First Declaration by Dr. Edwin Royce;

21 ²The Scott Guidelines rate trees as having a low, moderate or high
22 probability of survival. Ct. Rec. 34, n. 3 (citing EIS App. B-3). Trees
23 that have a low probability of survival can be harvested if they are not
24 needed to meet other resource objectives such as wildlife habitat. Id.
25 (citing EIS App. B-4). Under the EIS, for trees that rate as moderate,
26 the cambium should be evaluated on four sides of the base of the tree and
the tree may be removed, subject to other resource needs, only if the
cambium is dead on at least three sides. Id. at B-4 to B-5.

1.7 Declaration by Erik Fernandez;
 1.8 Memorandum in Support of Motion to Intervene;
 1.9 Declaration by John Fullerton;
 1.10 Declaration by Richard Schaefer;
 1.11 Declaration by Richard Dodge;
 1.12 Intervenor Applicants' Memorandum of Points and
 Authorities in Opposition to Motion for Temporary Restraining Order
 and Preliminary Injunction;
 1.13 Intervenor Applicants' Answer to Complaint;
 1.14 Declaration by Shay S. Scott;
 1.15 Defendants' Memorandum in Opposition to Motion for
 Temporary Restraining Order and Preliminary Injunction;
 1.16 Declaration by Beverly Li;
 1.17 Declaration by Philip Musgrove;
 1.18 Declaration by Kevin Martin;
 1.19 Declaration by Randall Walker;
 1.20 Declaration by Dean Millett;
 1.21 Declaration by Scott W. Horngren
 1.22 Affidavit by Edward J. Bruya
 1.23 Second Declaration by Philip Musgrove
 1.24 Reply Memorandum Re Motion for Temporary Restraining
 Order and Preliminary Injunction;
 1.25 Second Declaration by Edwin Royce;
 1.26 Declaration by Sean Malone;
 1.27 Declaration by Ernest Niemi;
 1.28 Second Declaration Ralph Bloemers;
 1.29 Third Declaration by Ralph O. Bloemers;
 1.30 Second Declaration by Dean R. Millett;
 1.31 Third Declaration by Dr. Edwin B. Royce; and
 1.32 Memorandum in Support of Plaintiffs' Motion to Strike
 Second Declaration of Dean Millett.

B. NEPA VIOLATION

NEPA is the "national charter for protecting the environment."
 40 C.F.R. §1500.1(a). It requires all federal agencies to prepare an
 environmental impact statement (EIS) for "major federal actions
 significantly affecting the quality of the human environment." 42
 U.S.C. §4332(C). NEPA is procedural in nature and does not require
 "that agencies achieve particular substantive environmental results."
Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371, 109 S.Ct. 1851
 (1989). Instead, it requires agencies to collect, analyze and

1 disseminate information so that "the agency will not act on incomplete
2 information, only to regret its decision after it is too late to
3 correct." *Id.*

4 Courts may not "fly-speck" an EIS and must employ a rule of
5 reason. *Swanson v. U.S. Forest Service*, 87 F.3d 339, 343 (9th Cir.
6 1996). The court must approve an EIS if it "fostered informed
7 decision-making and public participation." *Nat'l Parks & Conservation*
8 *Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 680 (9th Cir. 2000).
9 The court's task is to ensure that the agency has taken a "hard look"
10 at probable environmental consequences. *Hells Canyon Alliance v. U.S.*
11 *Forest Service*, 227 F.3d 1170, 1177 (9th Cir. 2000). The reviewing
12 court is to make a pragmatic judgment without substituting its
13 judgment for that of the agency concerning the wisdom or prudence of a
14 proposed action. *California v. Block*, 610 F.2d 953, 961 (9th Cir.
15 1982).

16 Challenges to final agency actions taken pursuant to NEPA are
17 subject to the review provisions of the Administrative Procedure Act
18 (APA). *Southwest Center for Biological Diversity v. Bureau of*
19 *Reclamation*, 143 F.3d 515, 522 (9th Cir. 1998). 5 U.S.C. §702
20 provides that "[a] person suffering legal wrong because of agency
21 action, or adversely affected or aggrieved by agency action within the
22 meaning of a relevant statute, is entitled to judicial review
23 thereof." Pursuant to 5 U.S.C. §706(2)(A), a reviewing court shall
24 "hold unlawful and set aside agency action, findings and conclusions
25 found to be arbitrary, capricious, an abuse of discretion, or
26 otherwise not in accordance with the law." For example, an agency's

1 determination of the environmental significance of new information
2 should stand unless it is found to be arbitrary and capricious.
3 Marsh, 490 U.S. at 377. Pursuant to 5 U.S.C. §706(2)(D), a reviewing
4 court shall also "hold unlawful and set aside agency action, findings
5 and conclusions found to be without observance of procedure required
6 by law." Disputes which are primarily legal in nature are reviewed
7 under a "reasonableness" standard. Alaska Wilderness Recreation &
8 Tourism v. Morrison, 67 F.3d 723, 727 (9th Cir. 1995).

9 1. Scott Marking Guidelines

10 Plaintiffs assert that the Project violates NEPA because USFS
11 refused to disclose and respond to the Scott Mortality Guidelines
12 controversy. Defendants, on the other hand, respond that the EIS
13 thoroughly discusses Plaintiffs' criticisms of the Scott Guidelines,
14 therefore complying with the NEPA requirement to acknowledge contrary
15 scientific views. Defendants point out that in the face of contrary
16 scientific views, USFS is entitled to rely on the views of their own
17 experts. The declaration of USFS professional forester Richard M.
18 Schaefer III is offered to supports USFS's conclusion that the timber
19 sales were narrowly tailored to focus on the most severely burned and
20 predominantly dead forest stands in the project area. In summary,
21 USFS argues that the EIS demonstrates the Scott Guidelines are amply
22 supported by the scientific literature and the USFS' reliance was
23 reasonable.

24 Plaintiffs specifically argue that the Scott Guidelines are
25 flawed in that these guidelines greatly overstate the rate of tree
26 death following fire. Ct. Rec. 46, at 20. Plaintiffs suggest,

1 through their expert Dr. Edwin Royce, that the Ryan and Reinhardt
2 model is better suited and more reliable for the evaluation of the
3 probability of mortality for the trees at issue in the Project site.
4 First Royce Decl., ¶17.

5 Defendants additionally note that Plaintiffs' reliance on Dr.
6 Royce's survey and conclusion that "64% of trees designated for
7 harvest had a good probability for survival" is fatally flawed because
8 he assumed that all trees marked had been marked according to Scott
9 Guidelines, when a majority of trees (for the 3 sales at issue) had in
10 fact been marked under the "Danger tree marking system."

11 Courts must defer to the Agency's determination of the
12 appropriate scientific methodology. See *Hell's Canyon Alliance v.*
13 *USFS*, 227 F.3d 1170, 1177 (9th Cir. 2000). Contrary to Plaintiffs'
14 position, however, at the present time there are not sufficient
15 technical documents before the Court that support Plaintiffs'
16 assertion that use of the Scott Guidelines by USFS was arbitrary and
17 capricious. Since substantial deference is given to the USFS's
18 decision to resolve scientific disputes as it sees fit and because
19 scientific evidence does not indicate the Scott Guidelines are fatally
20 flawed, the Court is not likely to find the USFS's use of this model
21 to be improper. *Friends of Endangered Species, Inc. v. Jantzen*, 760
22 F.2d 976, 986 (9th Cir.1985).

23 Although the Plaintiffs' attack on the scientific underpinnings
24 of the EIS, and in particular the use of the Scott's Guidelines,
25 raises reasonable questions, the agency's methodology does not fail
26 the "rule of reason." *Association of Public Customers v. Bonneville*

1 *Power Admin.*, 126 F.3d 1158, 1188 (9th Cir.1997). It is implicit
2 throughout the EIS that the USFS relied heavily on its own expertise
3 both in developing the method of analysis outlined above and in
4 conducting that analysis. The agency is entitled to rely on its own
5 expertise. *See generally Marsh*, 490 U.S. at 378, 109 S.Ct. 1851 ("an
6 agency must have discretion to rely on the reasonable opinion of its
7 own qualified experts" where specialists express conflicting views).
8 The USFS's analysis of the tree mortality in the sales cutting areas
9 using a tool (Scott Guidelines) developed for predicting relative
10 probability of survival of Conifers in the Blue and Wallowa Mountains³
11 but that has not to the Court's knowledge, as the Plaintiffs points
12 out, been validated specifically in the Douglas-fir and Ponderosa pine
13 tree context-is a decision well within the realm of its expertise.

14 It is not a violation of NEPA for the EIS to rely on particular
15 scientific methodologies and studies instead of others. *Friends of*
16 *Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir.1985);
17 see also, 40 C.F.R. § 1502.24. The agency's choice of studies on
18 which to rely is within its discretion, and courts are precluded from
19 reviewing such decisions unless they are found to be arbitrary or
20 capricious. 5 U.S.C. § 706(2)(A). While the Scott Guidelines are the
21 subject of critical comment, the Court cannot say as a matter of law
22 that the agency's decision to rely, in part, on the guidelines is
23 against all reason or, in other words, arbitrary and capricious.
24 Consequently, this Court will defer to the USFS's scientific

25
26 ³See EIS, B-2.

1 methodology used until there is sufficient and reliable research to
2 discredit the methodology so used.

3 2. Entry Into Roadless Areas

4 Plaintiffs argue that the USFS failed to analyze and disclose
5 potential environmental impacts this Project poses to roadless areas.
6 Plaintiffs states that logging is proposed in two significant roadless
7 areas (West Tucannon and Upper Cummins Creek) greater than 1000 acres
8 in size that are critically important to fish and wildlife. Further
9 Plaintiffs assert, the best scientific evidence establishes the
10 critical importance of roadless areas for survival and recovery of
11 salmon, steelhead, and bulltrout (i.e., roadless areas of 1000 acres
12 or larger are significant) regardless of whether the roadless areas
13 are classified as inventoried or uninventoried. Plaintiffs complain
14 that the USFS limited its analysis to roadless areas of 5,000 acres
15 which is arbitrary and in conflict with Ninth Circuit case law, and in
16 particular *Sierra Club v. Austin*, 82 Fed.Appx. 570, 573 (9th Cir.
17 2003).

18 Defendants respond that USFS has discretion to define the scope
19 of its project. The West Tucannon and Upper Cummings Creek areas are
20 not inventoried roadless areas (IRAs) as designated by the Forest
21 Service and are less than 5,000 acres in size. Defendants point out
22 that only two IRAs lie in or adjacent to the boundaries of the School
23 Fire: Willow Springs and Meadow Creek IRAs. Thus, no basis for the
24 type of analysis Plaintiffs assert was required under NEPA.

25 Defendants further respond that Plaintiffs reliance on the
26 statements of the U.S. Fish and Wildlife Service, National Marine

1 Fisheries Service, and the Eastside Forests Scientific Society Panel
2 made in the 1990s regarding unroaded areas greater than 1,000 acres to
3 argue that the West Tucannon and Upper Cummings Creek areas must
4 specifically be considered in the EIS is misplaced. These Biological
5 Opinion statements were concerned with a specific species-bull trout
6 and Snake River Salmon-not with inventoried roadless areas. These
7 statements, Defendants argue, have no bearing on whether unroaded
8 areas greater than 1,000 acres are to be addressed in any particular
9 manner under NEPA. Finally, Defendants point out, the regulations
10 that now govern IRAs, 36 C.F.R. §294 subpart B (2005), do not contain
11 specific direction requiring separate analysis of unroaded areas.

12 Although the analysis was very general, the Court finds that the
13 EIS adequately analyzed effects of the Project on the West Tucannon
14 and Upper Cummings Creek areas to satisfy NEPA, although it did not
15 separately discuss these two areas, but rather stated that "there are
16 no large blocks of land where the undeveloped character of the area
17 meets the minimum criteria of 5,000 acres or greater that might make
18 them potentially designated as an IRA or wilderness area." EIS, at 3-
19 270. It appears the EIS examined the environmental effects of the
20 Project on the identified "IRA-equivalents" and areas of undeveloped
21 character although in a very basic sense. EIS, at 3-270-71.

22 Because, as Defendants point out, no activities would occur in
23 IRAs as part to the Project except for felling of dangerous trees
24 along roads, the EIS concluded that there would be no effect on the
25 roadless character of IRAs. The EIS concluded that the Project would
26 have short-term effects on natural integrity and opportunity for

1 solitude and primitive experience in areas of undeveloped character,
2 which would fade over time. The EIS also concluded that no
3 irreversible or irretrievable effects were anticipated from any of the
4 alternatives.

5 Through the EIS, the USFS has articulated a reasonably thorough
6 discussion of the significant aspects of the probable environmental
7 consequences that will occur in the unroaded areas, which is all that
8 is required under Ninth Circuit review. See *Oregon Natural Resources*
9 *Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).⁴

10 Additionally, Plaintiffs complain that the USFS did not address
11 the impact on endangered species of salmon and steelhead as well as
12 other species in the EIS. The Court finds that while the USFS could
13 have provided additional information in this regard, the EIS does
14 discuss the possible impact to fish species, and other sensitive,
15 endangered and threatened species. EIS, Chapter 3.

16 Finally, Plaintiffs state the logging proposal in roadless areas
17 of the Project threatens irreparable harm and will permanently deplete
18 a range of goods and services that the public may enjoy in the future.
19 Ct. Rec. 46 at 3. Plaintiffs retained economic expert Ernest Niemi to
20 assess the range of harms and benefits from the Project. The Court

21
22 ⁴In reviewing the adequacy of an EIS, "[t]his circuit employs a
23 'rule of reason' that asks whether an EIS contains a 'reasonably thorough
24 discussion of the significant aspects of the probable environmental
25 consequences.' " *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519
26 (9th Cir.1992) (citations omitted).

1 has reviewed the declaration of Mr. Niemi, who agrees with Plaintiffs'
2 position, and alleges that the logging may not be economical to the
3 USFS unless the USFS considers reasonable alternatives and finds ways
4 to minimize collateral harm. Id. at 5. The declaration reflects the
5 crux of Plaintiffs' complaint—they disagree with the USFS's decision.
6 Mr. Niemi's opinion does not focus the Court's attention on the three
7 sales before the Court and its evidentiary reliability is compromised
8 in the context of a request for extraordinary relief due to its
9 speculative nature. The Court's job is not to question the wisdom of
10 the USFS's ultimate decision or its conclusion concerning the
11 magnitude of economic impacts. The evidence examined as a whole,
12 suggests the Forest Service made a reasonable, good faith, objective
13 presentation of those impacts sufficient to foster public
14 participation and informed decision making.

15 The reviewing court must make a pragmatic judgment whether the
16 EIS's form, content and preparation foster both informed decision
17 making and informed public participation. *Environmental Council v.*
18 *Kunzman*, 817 F.2d 484, 492 (9th Cir.1987). The reviewing court may
19 not "fly speck" an EIS and hold it insufficient on the basis of
20 inconsequential, technical deficiencies. Id. However, an EIS may be
21 found inadequate under NEPA if it does not reasonably set forth
22 sufficient information to enable the decision maker to consider the
23 environmental factors and make a reasoned decision. Id. Although the
24 USFS could have made its discussion of impact on roadless areas more
25
26

1 thorough, given the time constraints,⁵ the Court believes its treatment
2 of this issue was sufficient to satisfy the requirements of NEPA.

3 3. Consideration of the "No Action" Alternative or
4 Reasonable Range of Alternatives

5 Finally, the Court also rejects the claim that the USFS violated
6 NEPA by failing to include a reasonable range of alternatives. The EIS
7 considered three alternatives: (1) the no action alternative; (2) the
8 proposed action; and (3) an alternative that would harvest 4,188 acres
9 of predominantly dead trees (according to the USFS). Additionally the
10 USFS considered another twelve alternatives, but eliminated these
11 alternatives from further study for a variety of reasons. Ct. Rec.
12 34, at 25; EIS at 2-27 to 2-28. The USFS rejected Plaintiffs
13 alternative preference, to exclude logging in unroaded areas such as
14 the West Tucannon and Upper Cummins Creek areas, as inconsistent with
15 the purpose and need of the Project. EIS at 2-27. Further,
16 Defendants indicate that in rejecting Plaintiffs' alternative
17 preference, the USFS noted that all salvage harvest in the Project is
18 consistent with the UNF Land and Resource Management Plan ("LRMP")
19 management allocations, and that the LRMP considered and anticipated

20
21 ⁵The Declaration of Dean Millet, Project Leader for the School Fire
22 Salvage Recovery Project, indicates that delay beyond one year would
23 result in a potential loss of 12 Million Board Feet resulting in a
24 potential loss of \$1,547,000 to the Federal Government. Current loss
25 rates have apparently increased dramatically in the past two months as
26 well according to Mr. Millett. Ct. Rec. 39 at 2.

1 that such harvest following wildfire would occur, consistent with
2 guidelines and standards to protect the environment. Ct. Rec. 34, at
3 25.

4 The USFS had a duty to "[s]tudy, develop, and describe
5 appropriate alternatives to recommended courses of action," 42 U.S.C.
6 § 4332(E), to "[u]se the NEPA process to identify and assess the
7 reasonable alternatives to proposed actions that will avoid or
8 minimize adverse effects of these actions upon the quality of the
9 human environment," 40 C.F.R. § 1500.2(e), and to "[r]igorously
10 explore and objectively evaluate all reasonable alternatives." 40
11 C.F.R. § 1502.14(a).

12 An agency is required to examine only those alternatives
13 necessary to permit a reasoned choice. *Save Lake Washington v. Frank*,
14 641 F.2d 1330, 1334 (9th Cir.1981). "The 'rule of reason' guides both
15 the choice of alternatives as well as the extent to which the
16 Environmental Impact Statement must discuss each alternative." *City of*
17 *Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142,
18 1154-55 (9th Cir.1997). Under the facts of this case, the Court
19 concludes that the EIS was not deficient for failing to provide more
20 variations and alternatives to Alternative B. Plaintiffs failed to
21 demonstrate that the true "no action" alternative, or the requested
22 alternative prohibiting logging in roadless areas is a viable
23 alternative that the USFS was required by law to adopt or to evaluate
24 to a greater extent than it did. See *City of Carmel-By-The-Sea*, 123
25 F.3d at 1154-55 ("The Environmental Impact Statement need not consider
26

1 an infinite range of alternatives, only reasonable or feasible
2 ones.").

3 Given the limited number but varied range of alternatives
4 considered by the agency, the undersigned cannot say that this
5 violated the rule of reason. See *Northwest Env'l Defense Ctr. v.*
6 *Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9th Cir.1997) ("We
7 review an agency's range of alternatives under a 'rule of reason'
8 standard that 'requires an agency to set forth only those alternatives
9 necessary to permit a reasoned choice.' ") (citation omitted).

10 C. NFMA Violations

11 The USFS manages the Forest, and is required by statute and
12 regulation to safeguard the continued viability of wildlife in the
13 Forest. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957,
14 961 (9th Cir. 2002). In carrying out its management responsibilities,
15 the Forest Service must comply with the mandates of the Forest Act, 16
16 U.S.C. §§ 1600-1687. The Forest Act requires the Forest Service to
17 develop a land and resource management plan for each forest that it
18 manages. 16 U.S.C. § 1604.

19 Forest planning occurs at two levels: the forest level and the
20 individual project level. See generally, 36 C.F.R. Pt. 219 (2005); see
21 also *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-30 (1998).
22 At the forest level, the Forest Service develops a Land and Resource
23 Management Plan ("LRMP") or Forest Plan, which is a broad, long-term
24 planning document for an entire National Forest. LRMPs establish
25 planning goals and objectives for units of the National Forest System
26 and provide specific standards and guidelines for management of forest

1 resources, ensuring consideration of both economic and environmental
2 factors. 16 U.S.C. § 1604(g)(1)-(3). At the project level,
3 site-specific projects are proposed that are consistent with a LRMP.
4 *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511-12
5 (9th Cir. 1992). Each project may proceed only if it is consistent
6 with the LRMP, has been analyzed as may be necessary pursuant to NEPA,
7 and has been specifically approved by the responsible Forest Service
8 official. See generally 16 U.S.C. § 1604(i); *Inland Empire Pub. Lands*
9 *Council v. U.S. Forest Serv.*, 88 F.3d 754, 757(9th Cir. 1996).

10 1. Eastside Screens

11 The Eastside Screens, as explained by Plaintiffs, include three
12 separate screens: a riparian, ecosystem and wildlife screens. Ct.
13 Rec. 3 at 17. "Salvage sales," are not subject to the ecosystem
14 screen but such sales are required to comply with the riparian and
15 wildlife screens. Id. at 18. According to Plaintiffs, the Eastside
16 Screens remain in place for the forests in the UNF. Id. Plaintiff
17 further explains that if a tree is alive and greater than or equal to
18 21 inches in diameter, it must be protected from logging. Id. at 19.

19 At the hearing Defendants agreed with Plaintiffs regarding the
20 "21 inch rule" but informed of the exemptions to the Eastside Screens
21 as set forth in Appendix C of the EIS. The USFS maintains it complied
22 with the Eastside Screens.

23 Plaintiffs contend that the Project violates the "Forest Plan"
24 pursuant to NFMA. Plaintiffs explain that all site-specific projects
25 and activities on national forests must be consistent with the
26 applicable Forest Plan, which has specific standards for live tree

1 retention. According to Plaintiffs, USFS violates NMFA by allegedly
2 ignoring the Eastside Screens, the focus of which is to preserve
3 green, live trees that exist today in order to retain the option of
4 protecting these trees in the near future. By logging trees that are
5 alive, healthy and over 21 inches, Plaintiffs assert USFS violates the
6 Eastside Screens.

7 Plaintiffs expert Dr. Royce, states that substantial numbers of
8 live, green trees over 21 inches have been marked to cut. See First
9 Decl. of Dr. Royce, ¶26. Plaintiffs complain that the USFS
10 "stubbornly refused to reassess the status of the large trees marked
11 for harvest, along with its earlier predictions that these trees would
12 die, despite the evidence Plaintiffs have put forward." Ct. Rec. 3 at
13 23. This alleged refusal to reassess the status of the large trees is
14 arbitrary and capricious argues Plaintiffs. Id.

15 Although the declarations of Dr. Royce indicate that he used a
16 "systematic site selection protocol in the field work" the Court
17 cannot discern if he was surveying the proper sites for the three
18 sales at issue. For instance, Dr. Royce states that the map obtained
19 by the Plaintiff and its two volunteers Nathan Griffin and Shawn
20 Malone from the Pomeroy District Office, "did not contain any
21 information as to exactly where within those perimeters the logging is
22 slated to occur." Second Royce Decl. at ¶9.

23 It is difficult for the Court to tell if Plaintiffs' survey areas
24 overlap with the USFS's survey areas for the subject sales. Further,
25 Plaintiffs ask the Court to accept the data collected through the
26 systematic site selection protocol used by Dr. Royce to be

1 "representative of the entire project area." First Royce Decl., ¶82.
2 Plaintiffs fail to provide a clear showing to meets its burden for the
3 extraordinary relief sought. See *City of Angoon v. Marsh*, 749 F.2d
4 1413, 1415 (9th Cir. 1984). The requested relief cannot be granted
5 based on data Plaintiffs ask the Court to infer from sampling from
6 somewhere within the entire Project area, rather than specifically
7 from the cutting areas for the three subject sales.

8 **VI. Plaintiffs' Motion to Strike**

9 Plaintiffs request the Court to strike the Second Declaration of
10 Dean Millett, which declaration was filed on September 1, 2006 and
11 after the August 30th hearing. Plaintiffs argue that it contains new
12 information that has not been previously disclosed to the public.
13 Plaintiffs state that Mr. Millett's declaration includes extra-record
14 information that has not been provided to Plaintiffs prior to the
15 filing of the subject declaration. In the alternative, Plaintiffs
16 request the Court to be permitted to respond to the Second Dean
17 Millett Declaration with a Third Declaration of Edwin Royce and submit
18 additional briefing.

19 Defendants respond that Plaintiffs' motion to strike is without
20 merit. Specifically, Defendants argue that the Agency is allowed to
21 submit documents explaining the administrative record, particularly in
22 the context of a motion for temporary restraining order and
23 preliminary injunction where there is insufficient time to produce the
24 administrative record. Ct. Rec. 60 at 2 (citations omitted).
25 Defendants state that they did not have sufficient time to prepare the
26 extensive administrative record for the Project when they responded to

1 Plaintiffs' motion for emergency injunctive relief. Defendants
2 further argue that the Second Millett Declaration can be considered by
3 the Court because it is explanatory in nature. The Second Millett
4 declaration, Defendants state, can assist the Court in balancing the
5 harms because it describes the existence of past harvest in the West
6 Tucannon and Upper Cummings Creek areas. The Second Millett
7 declaration was offered to rebut the inaccurate statement made by
8 Plaintiffs at the oral hearing for the first time that there had been
9 no prior timber harvest in the West Tucannon and Upper Cummings Creek
10 areas. Finally, Defendants urge the Court to disregard the Third
11 Declaration of Dr. Royce offered as an alternative to the motion to
12 strike because Dr. Royce is not qualified under the Federal Rules of
13 Evidence to opine on the potential impacts the Milly, Oli and Sun
14 sales may have on erosion. According to Dr. Royce, his expertise lies
15 in the fields of applied physics and botany, with a specialization in
16 forest plant ecology. He does not profess to have expertise in the
17 areas of hydrology or soils. Ct. Rec. 60 at 7.

18 The Court finds Defendants' arguments convincing. The Second
19 Declaration of Millett will not be stricken. Further, the Court finds
20 that, although Dr. Royce's Third Declaration appears to opine beyond
21 his area of expertise, the declaration will be considered for
22 admissible content only.

23 **VII. Conclusion**

24 The EIS contains a reasonably thorough discussion regarding the
25 amount of timber that is dead, dying or expected to die in the Project
26 area and the effect that its removal, plus the removal of green trees,

1 will have on the environment. The timber sales Plaintiffs seek to
2 enjoin were narrowly tailored to focus on the most severely burned and
3 predominantly dead forest stands in the Project area. See Schaefer
4 Decl. Mr. Schaefer spent three months marking the dead trees burned
5 by the School Fire. Id. at ¶4. In contrast, Intervenor argued at
6 the hearing, Plaintiffs' expert Dr. Royce spent "a few days" marking
7 trees from a map that purportedly did not contain any information as
8 to exactly where within those perimeters the logging was slated to
9 occur.

10 Review of the EIS indicates that the Project appears to be
11 consistent with the LRMP, has been analyzed pursuant to NEPA, and has
12 been specifically approved by the responsible Forest Service official.
13 The USFS took the requisite "hard look" at the environmental impacts of
14 the Project on the various values of the UNF. The agency devoted 276
15 pages of the EIS to exploring the possible environmental consequences of
16 three alternatives on various values of the UNF. Although one may
17 disagree with its conclusions, the Court cannot conclude that the agency
18 failed in its duty to take the requisite "hard look."

19 **IT IS ORDERED:**

20 1. Plaintiffs' Motion for Temporary Restraining Order and
21 Preliminary Injunction, Ct. Rec. 2, filed August 16, 2006 is **DENIED**.

22 2. American Forest Resource Council, Boise Building Solutions
23 Manufacturing, LLC, and Dodge Logging, Inc.'s Motions to Expedite, Ct.
24 Recs. 21, 31, filed August 24, 2006 are **GRANTED**.

3. American Forest Resource Council, Boise Building Solutions Manufacturing, LLC, and Dodge Logging, Inc.'s Motion to Intervene, Ct. Rec. 22, filed August 24, 2006, is **GRANTED**.

4. Motion to Appear Pro Hac Vice re Attorney: Scott Horngren, Ct. Rec. 19, filed August 24, 2006, is **GRANTED**.

5. Plaintiffs' Motion to Strike Second Declaration of Dean Millett, or in the Alternative, Permission to Submit Third Declaration of Dr. Edwin B. Royce and Additional Briefing, Ct. Rec. 58, filed September 6, 2006, is **DENIED in part** and **GRANTED in part**. The Second Declaration of Dean Millett will be considered. The Third Declaration of Edwin Royce will be considered to the extent such evidence is admissible.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to counsel.

DATED this 11th day of September, 2006.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge